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No.______________

In the Supreme Court of the United States

OCTOBER TERM, 1983

McKISSICK PRODUCTS COMPANY and
AMERICAN HOIST AND DERRICK COMPANY,
d/b/a McKISSICK PRODUCTS DIVISION
Petitioner
v.
RAYMOND J. DONOVAN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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Throughout the period covered by this litigation the entities listed as "Petitioner" have comprised a single employer, which initially was a wholly-owned subsidiary of American Hoist and Derrick Company, and later was merged into the parent company and was operated as a division thereof. The singular term "Petitioner" refers to all relevant corporate entities.

QUESTIONS PRESENTED

1. Has Section 7 of the Fair Labor Standards Act, as amended, 29 U.S.C. §§ 201, 207, abrogated the freedom of an employer and his employees to establish by contract a regular rate of pay, of not less than the minimum wage, an overtime premium of not less than 150 per cent of the specified regular rate, and a guarantee of hours in excess of forty during a workweek?

2. Does Section 7(f) of the Fair Labor Standards Act, 29 U.S.C. §207(f), provide the exclusive means in which an employer and his employees can establish a guarantee of hours in excess of forty during a workweek?

TABLE OF CONTENTS

AUTHORITIES CITED

Page

CASES:

STATUTES:

OTHER AUTHORITIES

No.______________

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Petitioner, McKissick Products Company and American Hoist and Derrick Company, d/b/a McKissick Products Division, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Tenth Circuit (the "Circuit Court") is reported at 719 F.2d 350 (1983). It is unofficially reported at 26 W.H. Cases 791 (1983) and 99 L.C. ¶34,460 (1983) and appears in Appendix A at p. A-1.[1]

The Order denying Petitioner's Motion for Rehearing and Suggestion for Rehearing En Banc is attached at App. C, p. C-3.

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[1] All references to the Appendices to this Petition will be by "App." followed by a letter, and "p." followed by a page number. References to the Record on Appeal, which Petitioner will request be certified to this Court, will be by "R. Vol.__, p.__," inserting the appropriate volume and page numbers.

The orders and judgment of the U.S. District Court for the Northern District of Oklahoma (the "Trial Court") are not officially reported, but are attached at App. B., pp. B-1, B-19 and B-26.

JURISDICTION

The judgment of the Circuit Court was entered October 19, 1983 (App. C, p. C-1). Petitioner's timely Petition for Rehearing and Suggestion for En Banc Proceeding, was denied on November 30, 1983, (App. C, p. C-3). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

The relevant portions of Section 7 of the Fair Labor Standards Act, as amended, and as codified at 29 U.S.C. §207, are set forth below:

29 U.S.C. § 207

(a)(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * *

(e) As used in this section the "regular rate" at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include--

* * *

(5) extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or in

excess of the maximum workweek applicable to such employee under subsection (a) of this section or in excess of the employee's normal working hours or regular working hours, as the case may be;

* * *

(7) extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective-bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding the maximum workweek applicable to such employee under subsection (a) of this section, where such premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek.

(f) No employer shall be deemed to have violated subsection (a) of this section by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under subsection (a) of this section if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in subsection (a) or (b) of section 206 of this title (whichever may be applicable) and compensation at not

less than one and one-half times such rate for all hours worked in excess of such maximum workweek, and (2) provides a weekly guaranty of pay for not more than sixty hours based on the rates so specified.

* * *

(h) Extra compensation paid as described in paragraphs (5), (6), and (7) of subsection (e) of this section shall be creditable toward overtime compensation payable pursuant to this section.

STATEMENT OF THE CASE

A. THE FACTS

Petitioner manufactures, in Tulsa, Oklahoma, equipment for use with wire rope. Beginning in 1972, Petitioner entered into a series of individual written compensation agreements with each of its maintenance employees. The first such agreement appears as Appendix 1 to the Circuit Court's opinion. (App. A, p. A-17)

On or about December, 1976, Petitioner and its maintenance employees entered into written, signed compensation agreements, a representative copy of which appears as Appendix 2 to the Circuit Court's opinion. (App. A, p. A-20)[2] Contract No. 2 contained, inter alia, the following elements: (1) a specified regular rate of pay per hour well in excess of the minimum wage specified by 29 U.S.C. § 206; (2) a specific agreement that all hours worked in excess of the first forty hours each week would be paid at a rate not less than one and one-half times the specified regular rate; and (3) a guaranteed number

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[2]This Petition is brought only with respect to the written compensation agreements so represented. These agreements will be herein referred to as "Contract No. 2."

of hours of work in each workweek, which guaranty included overtime hours, generally varying between forty-four and fifty. Contract No. 2 was renegotiated and renewed periodically to reflect wage increases for the maintenance employees. All hours worked by such employees in excess of their individual guaranties were compensated at the rate of one and one-half times the contractual "regular rate."

On November 21, 1977, Respondent brought an action in the U.S. District Court for the Northern District of Oklahoma (the "Trial Court") to obtain injunctive relief against Petitioner for alleged violations of provisions of the Fair Labor Standards Act of 1938, as amended (the "Act"), 29 U.S.C. §201, et seq. Jurisdiction was based upon 29

U.S.C. § 217. Petitioner defended on the basis that its compensation plan met all the overtime pay requirements of 29 U.S.C. §207.

B. THE RULINGS OF THE TRIAL COURT

On June 17, 1980, the Trial Court granted Respondent's motion for partial summary judgment on the issue of liability. (App. B, p. B-1) On December 18, 1981, the Trial Court granted Respondent's motion for summary judgment as to the amount of overtime compensation due and as to the applicable statute of limitations. (App. B, p. B-19) On the same date, the Trial Court entered its judgment enjoining Petitioner from certain actions and directing the payment of certain amounts allegedly due as overtime compensation. (App. B, p. B-26)

1. The Basis of the Trial Court's Ruling that Petitioner Violated Section 7 of the Act.

As to Contract No. 2, the Trial Court found that an employee might work less than the guaranteed number of hours of overtime, but nonetheless be paid the guaranteed minimum. The Court cited Respondent's Interpretive Bulletin, codified at 29 C.F.R. § 778.403, in support of its conclusion that Petitioner's contracts would violate § 7 of the Act unless they fell within Section 7(f).

The Trial Court found that Petitioner had waived Section 7(f) of the Act, and concluded that Petitioner's wage plans violated the overtime provisions of the Act. The Trial Court distinguished the

holding, based upon facts substantially identical to those herein, in Tobin v. Little Rock Packing Co., 202 F.2d 234 (8th Cir. 1953), cert. denied 346 U.S. 832, 74 S. Ct. 26 (1953), on the basis that the decision in Little Rock Packing involved the exception now provided in Section 7(f).

2. The Trial Court's Order and Judgment Determining the Amount of Overtime Compensation Due.

The Trial Court's order and judgment were based upon the affidavit of one of Respondent's compliance officers, who had computed the alleged amount of overtime due by treating the entire amount received for hours up to the guaranteed minimum as a "salary", and computing the regular rate by dividing

the amount paid by the hours actually worked, up to the guarantee. However, the computation expressly excluded hours of work <u>over</u> the guarantee, which were conceded to have been compensated at one and one-half times the "regular rate" specified in the individual agreements. Respondent did not seek or compute additional overtime compensation for hours in excess of the individual employee's guarantee. (R. Vol. 1, p. 398)

The Trial Court granted Respondent's motion for summary judgment and determined that the amount of compensation due to Petitioner's employees was to be calculated by the method proposed by Respondent.

C. THE CIRCUIT COURT'S OPINION

Petitioner filed a timely appeal of the Trial Court's judgment to the U.S. Court of Appeals for the Tenth Circuit (the "Circuit Court"). The Circuit Court affirmed the Trial Court's orders in an opinion dated October 19, 1983.

1. The Circuit Court's Rulings as to Petitioner's Contractual Regular Rate of Pay.

The Circuit Court affirmed the Trial Court's holding that Petitioner's plans violated the Act. As to Contract No. 2, the Circuit Court found that Petitioner paid its maintenance employees a fixed, predetermined amount for varying hours of work, and that this had the effect of allowing Petitioner to pay the same

compensation regardless of the number of hours actually worked, up to the guarantee. The Circuit Court noted that "it was conceded that the hours of [Petitioner's] maintenance employees generally fluctuated only in the overtime range, and that no employee worked less than 40 hours per week unless he did so for personal reasons." (App. A, p. A-15) Based upon this fact, and Petitioner's stipulation, the Circuit Court found that Section 7(f) of the Act did not apply to Petitioner.

The Circuit Court expressly declined to follow the principle of Walling v. A.H. Belo Corp., 316 U.S. 624 (1942), stating that "the rule of Belo is codified in 29 U.S.C. §207(f)." (App. A, p. A-14) The Circuit Court did not discuss the principles of Belo, relying

instead upon its finding that Section 7(f) of the Act did not apply. Thus, the Circuit Court did not discuss or rule on the issue raised by Petitioner that it was improper to disregard the contractual regular rate of pay, and substitute a higher "regular rate", in the absence of any evidence that the contractual rate was fictitious or artificial.

2. The Circuit Court's Ruling as to Credit for Overtime Compensation.

In its briefs to the Circuit Court, Petitioner contended that it was entitled to a credit for overtime compensation already paid under its individual employment contracts, citing 29 U.S.C. §§207(e)(5) and (7), and 29 U.S.C. §207(h). The Circuit Court ruled that the contentions had not been raised at

the Trial Court, and that in any event 29 U.S.C. §207(e)(7) was not applicable. The Circuit Court did not address credits for payments for overtime hours as defined by § 207(e)(5).

REASONS FOR GRANTING THE WRIT

A. THE CIRCUIT COURT'S DECISION IMPROPERLY ABROGATES THE FREEDOM OF AN EMPLOYER AND AN EMPLOYEE TO ESTABLISH A REGULAR RATE OF PAY, OVERTIME PREMIUM AND HOURS OF WORK.

1. The Circuit Court's Decision is Contrary to the Principles Established by this Court.

Not since 1953 has this Court been presented with a factual situation like the one herein. In 1953, the Secretary

of Labor unsuccessfully sought a writ of certiorari from an adverse decision from the Eighth Circuit in Tobin v. Little Rock Packing Co., 202 F.2d 234 (8th Cir. 1953), upholding as valid a compensation agreement virtually identical to the Contract No. 2 here involved. 21 U.S. Law Week 3327 (1953).

In that case, the Circuit Court rejected the identical arguments of the Secretary of Labor raised, and accepted, below in this case. Until the decision for which writ of certiorari is here sought, the Secretary had been completely unsuccessful in convincing any court that a pay plan like Contract No. 2 is invalid or that § 7(f) of the Act is the exclusive source of any overtime guarantee.

It is settled that Congress, through the commerce clause, may require private contracts regulating overtime to comply with the statutory requirement of time and a half for overtime. See, e.g., Overnight Motor Transportation Co. v. Missel, 316 U.S. 572, 62 S.Ct. 1216, 86 L. Ed. 1682 (1942). It is equally clear, however, that an employer and an employee may establish the statutory "regular rate" by contract. See, Walling v. A.H. Belo Corp., 316 U.S. 624, 631, 62 S.Ct. 1223, 1227, 86 L. Ed. 1716 (1942). In a series of decisions during the 1940's which followed Overnight Motor Transportation and Belo, this Court addressed the interface between contract rights and the requirements of Section 7 of the Act. Respondent has consistently attempted to limit and undermine these

principles, and this effort has been facilitated by the decision of the Circuit Court.

The wage plan involved in Belo established a basic rate of pay for the then-applicable maximum workweek, expressly provided for receipt of not less than one and one-half times the "basic rate" for excess hours, and established a guaranty of not less than a stated sum per week. Once an employee worked enough hours at the contract rate to earn more than the guaranty, all surplus time was paid for at the rate of 150 per cent the contract wage. Further, if an employee received an increase in pay, the hourly rate and weekly rate were readjusted. 316 U.S. at 627-629, 62 S.Ct. at 1225-1226. This Court in Belo held:

> . . . the guaranty contract in this case carries out the intention of the Congress. It specifies a basic hourly rate of pay and not less than time and a half that rate for every hour of overtime work beyond the maximum hours fixed by the Act. It is entirely unlike the Missel case . . . . In the contract in that case there is no stated hourly wage and no provision for overtime.
>
> * * *
>
> The problem presented by this case is difficult -- difficult because we are asked to provide a rigid definition of "regular rate" when Congress has failed to provide one. Presumably Congress refrained from attempting such a definition because the employment relationships to which the Act would apply were so various and unpredictable. [Citations omitted.]

316 U.S. at 634-635, 62 S.Ct. at 1228-1229.

This Court has never departed from the principles stated in Belo. When this Court has refused to apply a contractually-agreed "regular rate of

pay", it has done so on the basis that the purported "regular rate" was unrealistic and artificial. As stated by the Court in Walling v. Younger-Reynolds Hardwood Co., 325 U.S. 419, 424-426, 65 S.Ct. 1242, 1245, 89 L.Ed. 1705 (1945):

> . . . the regular rate refers to the hourly rate actually paid the employee for the normal, non-overtime workweek for which he is employed. Walling v. Helmerich & Payne, supra, 323 U.S. 40, 65 S.Ct. 13; United States v. Rosenwasser, 323 US. 360, 363, 65 S.Ct. 295, 297. . . . As long as the minimum hourly rates established by Section 6 are respected, the employer and employee are free to establish this regular rate at any point and in any manner they see fit. They may agree to pay compensation according to any time or work measurement they desire. United States v. Rosenwasser, supra. "But this freedom of contract does not include the right to compute the regular rate in a wholly unrealistic and artificial manner so as to negate the statutory purposes." Walling v. Helmerich & Payne, Inc.,

> supra, 323 U.S. 42, 65 S.Ct. 14. <u>The regular rate by its very nature must reflect all payments which the parties have agreed shall be received regularly during the workweek, exclusive of overtime payments. It is not an arbitrary label chosen by the parties; it is an actual fact.</u> [Emphasis added.]

In <u>Younger-Reynolds Hardwood</u>, the contractual "regular rate" was rejected because of the finding that the purported "rate":

> . . . does not constitute the hourly rate actually paid for the normal, non-overtime workweek. Nor is it used as the basis for calculating the compensation received for overtime labor. It is not in fact the regular rate under any normal circumstances.

Id. Similarly, the "Poxon" or split-day plan in Walling v. Helmerich & Payne, Inc., 323 U.S. 37, 41, 65 S.Ct. 11, 14, 89 L.Ed. 29 (1944) was found unlawful. As stated by this Court:

> The vice of respondent's plan lay in the fact that the contract regular rate did not represent the rate which was actually paid for ordinary, non-overtime hours, nor did it allow extra compensation to be paid for true overtime hours. It was derived not from the actual hours and wages but from ingenious mathematical manipulations, with the sole purpose being to perpetuate the pre-statutory wage scale. [Footnote omitted.]

See also, 149 Madison Ave. Corp. v. Asselta, 331 U.S. 199, 209-210, 67 S.Ct. 1178, 1184 91 L.Ed. 1432 (1947) (plan invalidated because no provision for guaranteed weekly wage with proper stipulation of regular rate).

None of these elements of artificiality have been demonstrated as to Petitioner's wage agreements. Rather, it is abundantly clear that the agreements represented by Contract No. 2 expressly established a regular rate of pay, and provided for time and one-half for all hours in a workweek in excess of forty. Thus, the parties have expressly recognized the requirements of the Act, contemplated their impact on the employment relationship, and have structured the compensation agreements to comply with the Act's requirements. The Act does not require more.

According to the Respondent's own calculations, R. Vol. 1, p. 431, Petitioner actually paid its employee covered by Contract No. 2, Don Abbott, in accordance with the $6.34 regular rate of

pay specified therein. (R. Vol. 1, p. 425) Abbott received, pursuant to the guaranty, the sum of $1,262.80 each monthly payday for the guaranteed 44 hours per week.

$6.34 x 40 =	$253.60
$6.34 x 4 x 150% =	38.04
	$291.64
x 52 weeks : 12 months =	4.33
	$1,262.80

Petitioner and its employees did agree to a guaranteed minimum number of hours worked. Admittedly, the Petitioner paid an amount equal to the compensation which would be computed for the guaranteed minimum hours if Petitioner was unable to schedule work for the number of hours provided by the guaranty. However, this did not render the contract rate illusory, and it was admitted by

Respondent that the contract rate was used to determine the hourly rate and overtime premium for hours worked in excess of the guaranty. (R. Vol. 1, p. 398) The "regular rate" established by Petitioner's agreements was also periodically adjusted to reflect increases in wage rates. Thus, there is no evidence to support a conclusion that the "regular rate" as defined by Petitioner's agreements was illusory or ficticious.

The refusal of the Circuit Court to apply the principles established by Belo and its progeny places it squarely in conflict with the decisions of this Court. The Circuit Court permitted the Trial Court to discard the express agreement of Petitioner and its employees, and thus denied the parties

their freedom to contract for a method of computation which scrupulously adhered to the Act's requirements as to the minimum wage and compensation for overtime hours.

In Bay Ridge Operating Co. v. Aaron, 334 U.S. 446, at 462-463, 68 S.Ct. 1186, at 1195-1196, 92 L.Ed. 1502 (1948), the most recent decision of this Court exploring the meaning of "regular rate of pay," Justice Reed included an explication of the test to be applied in determining the validity of a contractually specified regular rate of pay:

> Our assent to the Belo decision, moreover, does not imply that mere words in a contract can fix the regular rate. That would not be the maintenance of a flexible definition of regular rate but a refusal to apply a statutory requirement for protecting workers against excessive

hours. The results on the individual of the operations under the contract must be tested by the statute. As Congress left the regular rate of pay undefined, we feel sure the purpose was to require judicial determination as to whether in fact an employee receives the full statutory excess compensation, rather than to impose a rule that in the absence of fraud or clear evasion employers and employees might fix a regular rate without regard to hours worked or sums actually received as pay.

It is significant that in the forty years since the Belo decision, Congress has not fixed a rigid definition of "regular rate of pay."

When 29 U.S.C. § 207(d) was added to the Act in 1949, it was intended as a definition of exclusion rather than inclusion by defining regular rate broadly as "all remuneration for employment" with a number of very explicit exclusions therefrom.

2. The Ruling of the Circuit Court is in Conflict with Decisions of Other Federal Courts of Appeals on this Same Matter.

At least one federal circuit court of appeals has expressly approved compensation agreements which established a regular rate, provided for the requisite overtime premium and guaranteed hours of work. The Court in Tobin v. Little Rock Packing Co., 202 F.2d 234 (8th Cir. 1953), cert. denied, 346 U.S. 842 (1953), found that such a contract did not violate the Act. The hours of work involved in Little Rock Packing were not "irregular hours" in terms of a fluctuation in hours above and below forty hours per workweek.

In Little Rock Packing, certain office employees had an established workweek of fifty hours, and had contracts that provided for compensation at an hourly rate, including time and one-half for overtime. The employees were guaranteed fifty hours of work per week, and were paid for such hours at the agreed rate, including time and one-half for overtime, whether the guaranteed number of hours were worked or not. 202 F.2d at 236. Although initially such employees generally worked fifty hours, a change in working conditions resulted in the employees being able to complete work earlier than before, and their hours began to fluctuate between forty-six and forty-nine hours per week. Id. After reviewing the various authorities, the Eighth Circuit in Little Rock Packing held, at 202 F.2d 234, 238:

> . . . the validity of guaranteed wage plans depends upon the particular facts in each case. All of [the cases], regardless of the result on the particular facts involved, stand for the rule that the Fair Labor Standards Act imposes no inflexible form of contract on employer and employee. The test applied in each case is whether the wage rate specified in the contract of employment is ficticious or whether the stipulated rate is in fact the actual rate paid for the normal non-overtime workweek. Contracts of employment in which the stipulated hourly rate bears no relation to the compensation guaranteed by the contract are violative of the Act. Contracts in which, as in the present case, the guaranteed compensation is actually predicated upon and computed by the stipulated wage rate meet all the requirements of the Act. This was true before as it is after the amendment of the Act in 1949 to recognize the validity of such contracts. [Footnote omitted and emphasis added.][3]

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[3]Significantly, Respondent's Petition for Certiorari in Little Rock Packing, as
(footnote continued)

The Eighth Circuit has not departed from the principles established by the decision in Little Rock Packing. Contrary to Respondent's assertion below, the decision of the Eighth Circuit in Marshall v. Hamburg Shirt Corp., 577 F.2d 444 (8th Cir. 1978), does not overrule Little Rock Packing. The Court in Hamburg Shirt, invalidated a guaranteed overtime provision based upon its failure to comply with the requirements Section 7(f) of the Act. Unlike Little Rock Packing, the plan in Hamburg Shirt purported to establish a "fixed salary for fluctuating hours." However, the contract in Hamburg Shirt did not

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reported at 21 U.S.L.W. 3327 (1953), apparently raised the same objections to the computation of the "regular rate" in that case as it has to Petitioner's agreements. This Court denied certiorari at 346 U.S. 842 (1953).

establish a fixed "regular rate" from which overtime compensation due could be computed, and did not in fact properly compensate overtime hours. The plan considered in Hamburg Shirt was entirely distinguishable from the plan in Little Rock Packing, and from Petitioner's compensation agreements.

The decision of the Circuit Court with respect to Petitioner's compensation agreements is also in conflict with the analysis consistently applied by federal circuit courts of appeal as to the computation of the regular rate to employees compensated on a lump-sum basis.[4] In this regard, federal circuit

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[4]Although Petitioner believes the facts establish that no "lump-sum" basis was used, the Circuit Court and the Trial Court approved a method of computation of (footnote continued)

courts have upheld the inference the regular rate actually paid in some cases was substantially that "obtained by dividing the weekly wage payable for the working of the scheduled workweek by the number of hours in such scheduled workweek." However, such an inference is permitted only when the defendant fails to carry "its burden of showing an express agreement with its employees as to the regular rate of pay for the first forty hours of work per week." See, e.g., Marshall v. Chala Enterprises, Inc., 645 F.2d 799, 801 (9th Cir. 1981); Brennan v. Valley Towing Co., 515 F.2d

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"salary." No credit was allowed for the amounts designated as overtime compensation in Contract No. 2, thus not complying with 29 U.S.C. § 207(e)(5) and § 207(h).

100, 106 (9th Cir. 1975); Wirtz v. Leon's Auto Parts Co., 406 F.2d 1250, 1251-1252 (5th Cir. 1969).

The Circuit Court's opinion is also inconsistent with the ruling affirmed by the Sixth Circuit in Marshall v. Hendersonville Bowling Center, 483 F.Supp. 510 (M.D. Tenn. 1980), aff'd. without published opinion 672 F.2d 917 (6th Cir. 1981). The Court in Hendersonville Bowling Center refused to disregard the terms of the parties' contract for a workweek of 47.5 hours, and rejected an imputed rate determined by dividing the weekly salary by 47.5. The District Court held:

> There is no reason in law why an employer and employee cannot contract for a longer workweek than 40 hours, so long as the excess hours are compensated at a rate one and one-half times

> the regular rate, and so long as the minimum wage provisions are not violated.

483 F.Supp at 515.

See also Mitchell v. Macon Shirt Co., 230 F.2d at n. 3 (5th Cir. 1956); Beechwood Lumber Co. v. Tobin, 199 F.2d 878 (5th Cir. 1952); McComb v. Pacific & Atlantic Shippers Ass'n, 8 WH Cases 43 (N.D. Ill. 1948), aff'd 175 F.2d 411 (7th Cir. 1949); Boll v. Federal Reserve Bank, 21 WH Cases 876 (E.D. Mo. 1973); Wirtz v. Empire Lumber Co., 19 WH Cases 103 (S.D. Ga. 1969).

With regard to Petitioner's Contract No. 2, the facts before the Trial Court on summary judgment clearly established an express agreement between Petitioner and its employees as to the regular rate.

Petitioner carried its burden, and the Circuit Court and the Trial Court improperly failed to give effect to the contractual regular rate, or give credit for the contractual overtime premium. These failures were clearly inconsistent with the principles established and approved by this Court and other federal circuit courts of appeal.

B. SECTION 7(f) OF THE ACT DOES NOT PROVIDE THE EXCLUSIVE MEANS OF GUARANTEEING HOURS OF WORK.

Both the Circuit Court and the Trial Court held that the principles established by this Court in Belo were limited to contracts within the terms of Section 7(f) of the Act. The Circuit Court expressly noted Petitioner's "waiver" of Section 7(f), stating that it

had been conceded that the fluctuation in the hours of Petitioner's employees generally was only in a range above forty hours per week. Similarly, the Trial Court found Little Rock Packing inapposite based upon its conclusion that Little Rock Packing was a case which relied upon former Section 7(e) of the Act, now Section 7(f).

As stated by the Circuit Court, Petitioner's concession that Section 7(f) did not apply was based upon Respondent's interpretation that only fluctuations in hours both above and below forty hours per week would satisfy the requirement of "irregular hours" in Section 7(f). (See, 29 C.F.R. § 778.406) However, Little Rock Packing clearly did not involve fluctuation of hours below forty, nor did it involve demonstrably unpredictable

hours. 202 F.2d at 236-237. Thus, the decision of the Eighth Circuit in <u>Little Rock Packing</u> cannot be read as a mere application of the limited provisions added in Section 7(e) of the 1949 amendments to the Act, now Section 7(f). (See Act July 20, 1949, c. 352, § 1, 63 Stat. 446; Act Oct. 26, 1949, c. 736, §§ 7, 16(f), 63 Stat. 912, 920).

There is nothing in the text or the legislative history of the 1949 amendments to the Act which supports the theory that Congress intended to abrogate the freedom of an employer and its employees to contract for overtime hours, provided that the express mandate of the Act was recognized, contemplated and followed. The limited legislative history available indicates that the purpose of adding Section 7(e), now

Section 7(f), was to limit the number of hours of guaranteed pay plans involving irregular hours. See, Comments of Representative Combs, 95 Cong. Rec. 11221 (1949).[5]

The principles of Belo were not limited by Section 7(f), except as to the maximum hours which could be guaranteed for businesses which necessitated irregular hours. Employers and employees remain free to provide for compliance with the Act by express agreement.

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[5]In this regard, this Court in Walling v. Halliburton Oil Well Cementing Co., 331 U.S. 17, 67 S.Ct. 1056, 91 L.Ed. 1312 (1947) had approved a guaranteed salary for up to 84 hours in a workweek before additional overtime compensation was earned.

Respondent's own regulation asserted as a basis to invalidate Contract No. 2, 29 C.F.R. § 778.403, assumes gratuitously that § 7(f) is a broad exception to § 7(a). That assumption is directly contradicted by 29 C.F.R. § 778.408(b), which recognizes the real reason for § 7(f) of the Act: to permit an employer to create an <u>artificially low hourly rate</u> of pay to offset in part the employer's willingness to guarantee minimum weekly earnings even if the employee works few or no hours. See also, 29 C.F.R. § 778.406 for a further recognition of this balancing of interests which underlies § 7(f) of the Act.

Petitioner and its employees precisely defined the "regular rate", and expressly provided for an overtime premium. The probability of hours in excess of forty

was recognized, and Petitioner (1) obligated itself to pay a premium of at least 1.5 times the regular rate for such hours, and (2) provided a guaranty of the opportunity to work a specified number of hours at the premium rate. Section 7(a) of the Act does not invalidate such an agreement, and any contrary interpretation would unnecessarily interfere with the parties' contract. In adopting Respondent's position that Section 7(f) provides the only means by which hours in excess of forty per week can be guaranteed, the Circuit Court and the Trial Court turn this Court's decision in Belo on its head.

In Belo the fact of irregular hours was noted by this Court to support the business justification and legitimacy of the parties' contract. This Court gave

primacy to the agreement in Belo, and afforded "the fullest possible scope to agreements among the individuals actually affected." 316 U.S. at 635, 62 S. Ct. at 1229. Nothing in Belo, however, suggests that legitimacy could not be established in other contexts. Petitioner's agreements represented by Contract No. 2 expressly established a regular rate and properly provided for overtime compensation. There was no showing that the "regular rate" was illusory or contrived.

Thus, Petitioner could have simply established a regular rate, agreed to properly compensate overtime and negotiated or implemented a plant rule requiring its employees to work hours in excess of forty when scheduled. Without a guaranty of overtime hours,

Respondent's theory would not apply. However, the only significant distinction between the described arrangement and Contract No. 2 is that the employees lose the benefit of the guaranty.

Congress did not intend to eliminate arrangements which are to the benefit of both of the contracting parties. The existence, or non-existence, of Section 7(f) of the Act is irrelevant to the validity of the compensation agreements between Petitioner and its employees (Contract No. 2). This Court should resolve the important issue raised by the refusal of Respondent, the Trial Court and the Circuit Court to give effect to Petitioner's valid contracts, and the determination that Section 7(a) of the Act was violated.

CONCLUSION

The Circuit Court has rendered a decision on a federal question in conflict with the applicable decisions of this Court and in conflict with the decisions of other federal courts of appeals.

The rationale on which both courts below invalidated Contract No. 2 was level earnings for all hours worked up to the guaranteed minimum workweek. That was the precise argument of the dissenters in Belo, an argument never before accepted by this Court.

For the reasons stated herein, the petition for writ of certiorari should be

granted, and the decisions below reversed.

Respectfully submitted,

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Counsel for Petitioner

APPENDIX A

PUBLISH

No. 82-1255

UNTED STATES COURT OF APPEALS

TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Cicuit
OCT 19, 1983
HOWARD K. PHILLIPS
Clerk

UNITED STATES DEPARTMENT OF LABOR

Petitioner

v.

McKISSICK PRODUCTS COMPANY and

AMERICAN HOIST AND DERRICK COMPANY,

d/b/a MCKISSICK PRODUCTS DIVISION

Respondent

Appeal from the United States District

Court for the Northern District of

Oklahoma

(D.C. Civil Action No. 77-C-485-C)

Richard L. Barnes of Nichols & Wolfe, Inc., Tulsa, Oklahoma, for Respondent.

Patricia Saik, Attorney (T. Timothy Ryan, Jr., Solicitor of Labor; Beate Bloch, Associate Solicitor; Joseph M. Woodward, Attorney; and James E. White, Regional Solicitor; with her on the brief), Washington, D.C., for Petitioner.

Before SETH, Chief Judge, McWILLIAMS, Circuit Judge, and KERR,* District Judge.

McWILLIAMS, Circuit Judge.

---

*Honorable Ewing T. Kerr, United States District Judge for the District of Wyoming, sitting by designation.

The Secretary of Labor brought this action under the Fair Labor Standards Act, 29 U.S.C. § 201, et. seq., to enjoin McKissick Products Division and its parent corporation, American Hoist and Derrick Company, from violating the overtime pay provisions of the Act, 29 U.S.C. § 207, and from continuing to withhold overtime compensation due certain of its employees.

The principal issue initially decided by the district court on cross-motions for summary judgment was whether the two wage plans under which McKissick paid its

maintenance employees violated section 7(a) of the Act. 29 U.S.C. § 207(a). During this stage of the proceedings, the district court had before it the two wage plans, answers to numerous interrogatories, and the deposition of Mr. Charles Lucas, vice-president and general manager of McKissick. The district court held tht the pay plans under attach did not comply with the Act's overtime provisions.

McKissick had previously stipulated in a pretrial order that the duties of its maintenance employees did not require irregular hours of work, and admitted in the pre-trial order that it did not qualify for the overtime exception set forth in section 7(f) of the Act. 29 U.S.C. §207(f). Accordingly, the district court held that section 7(f) of the Act was inapplicable. Furthermore,

having failed to affirmatively plead other exceptions to the overtime requirement, the district court held that such had been waived by McKissick.

Subsequent to the district court's order granting the Secretary's motion for partial summary judgment on the issue of whether the wage plans violated the overtime provision of the Act, the parties stipulated that certain payroll summaries prepared by an employee of the Department of Labor reflected the actual hours worked by McKissick's maintenance employees and the amounts actually paid to such employees for the hours worked by each. Thereafter, the Secretary moved for summary judgment. The district court granted the Secretary's motion holding, inter alia, that McKissick's violation of the overtime provisions of the Act were willful and that accordingly the three-

year statute of limitations applied. Further, the district court held that the amount of compensation due McKissick's maintenance employees should be calculated according to the method proposed by the Secretary. This particular order was followed by formal judgment, entered the same date, enjoining McKissick from further violations of the overtime provisions of the Act and from withholding payment of back overtime pay in the amount of \$90,218.75. McKissick thereafter filed a motion for a new trial and a motion to vacate judgment, which the district court denied. McKissick now appeals all of the orders above mentioned. We affirm.

McKissick Products Company, a division of American Hoist and Derrick Company, has a plant in Tulsa, Oklahoma, where it manufactures equipment such as lifting

tackle, wire line, and chain accessories designed for use with wire rope. During the time period here in issue, i.e., from 1974 to date of judgment, McKissick compensated its maintenance employees according to the terms of individual agreements, each called an "Employee Compensation Contract," entered into with each of its maintenance employees on an individual basis. Although the form of the contract was slightly modified in December, 1976, the employment contracts, both before and after that date, contained the same essential feature, namely, a guaranteed wage which was paid regardless of how many hours were actually worked up to a contractually agreed minimum.

An example of the individual employment contract in effect from 1974 until December, 1976, is attached to this opinion as Appendix No. 2, and will be referred to as Contract No. 2.

Congress has determined that employers involved in interstate commerce shall pay their employees premium pay for overtime work. Specifically, section 7(a)(1) of the Act provides that such employee must receive compensation for hours worked in excess of 40 hours per week at a rate not less than one and one-half times the regular rate at which he is employed. 29 U.S.C. § 207(a)(1). The purpose behind the overtime pay requirement is two-fold: (1) to spread employment by encouraging employers to avoid overtime work and thereby employ additional workers on a regular basis; and (2) where the employer prefers overtime work, to compensate the

employee for the burden of working longer hours. So, the basic issue to be resolved is whether the two pay plans of McKissick for its maintenance employees square with the simple statutory command that an employee who works more than 40 hours at a rate which is at least one and one-half times his regular rate of pay.

Contract No. 1, Appendix No. 1, provides that the regular rate of pay is \$3.94 per hour for the first 50 hours each week, and all hours worked in excess of 50 hours each week shall be paid at a rate of not less than one and one-half times the regular rate of pay. That contract further provides that an employee is guaranteed a monthly wage of not less than \$850 per month for regular time and such overtime, if any, as the necessities of business demand, regardless of the number of hours

actually worked. Charles Lucas, the vice-resident and general manager of McKissick, in his deposition stated that $3.94 was not really the regular rate of pay. He testified that under the monthly guarantee, the regular rate of pay was not reflected in the contract. He also stated that some employees expressed concern about the overtime provisions fo Contract No. 1. Without belaboring the matter, it is apparent that Contract No. 1 does not comply with the statutory mandate that an employee be paid at least time and one-half the regular rate of pay for all hours worked in excess of 40 hours per week.

Contract No. 2, Appendix No. 2, provides that the regular rate of pay is $6.34 per hour, and that all hours worked in excess of 40 hours per week shall be paid at a rate of not less than one and

one-half times the regular rate. However, that contract goes on to provide that employees shall have a guaranteed minium work week of 44 hours per week. In this regard, Charles Lucas testified in his deposition that the practical effect of this minimum work week provision was that an employee who actually worked less than forty-four hours in a given week would nonetheless be paid a guaranteed minimum wage. The guarantee in Contract No. 2 was for forty-four hours of <u>pay</u>, and not for forty-four hours of <u>work</u>. McKissick paid its maintenance employees a fixed predetermined amount for varying hours of work from week to week which had the practical effect of allowing the employer to pay the same compensation regardless of the number of hours actually worked, up to the guarantee.

Section 7(f) of the Act relates to weekly guarantees of pay, and provides as follows:

> (f) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under subsection (a) if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in subsection (a) or (b) of section 6 (whichever may be applicable) and compensation at not less than one and one-half times such rate for all hours worked in excess of such maximum workweek, and (2) provides a weekly guaranty of pay for not more than 60 hours based on the rates so specified.

29 CFR § 778.403 implements Section 7(f) of the Act, and provides as follows:

§ 778.403. Constant pay for varying workweeks including overtime is not permitted except as specified in Section 7(f).

Section 7(f) is the only provision of the Act which allows an employer to pay the same total compensation each week to an employee who works overtime and whose hours of work vary from week to week. (See in this connection the discussion in §§778.207, 778.321-778.329, and 778.308-778.315.) Unless the pay arrangements in a particular situation meet the requirements of Section 7(f) as set forth, all compensation received by the employee under a guaranteed pay plan is included in his regular rate and no part of such guaranteed pay may be credited toward overtime compensation due under the Act. Section 7(f) is an exemption from the overtime provisions of the Act. No employer will be exempt from the duty of computing overtime compensation for an employee under Section 7(a) unless the employee is paid pursuant to plan which actually meets all the requirements of the exemption. These requirements will be discussed separately in the ensuing sections.

Applying Section 7(f) and the implementing regulation set forth, the McKissick's wage plan contained in Contract No. 2 does not comply with the overtime provisions of section 7(a) of the Act, and does not qualify for any exception, including the exception provided for by section 7(f) of the Act. Donovan v. Brown Equipment and Service Tools, Inc., 66 F.2d 143 (5th Cir. 1982); Marshall v. Hamburg Shirt Corp., 577 F.2d 444 (8th Cir. 1978).

McKissick claims that its pay plans, or at least the plan embodied in Contract No. 2, comes within the abit of Walling v. A.H. Belo Corp., 316 U.S. 624 (1942). We disagree. The rule of <u>Belo</u> is codified in 29 U.S.C. § 207(f). As previously discussed, Section 7(f) applies to an employer who is engaged in a business with unpredictable weekly

hours of work. However, McKissick, by pretrial order, stipulated that its business was not of that nature, and the provisions of 29 US.C. § 207(f) did not apply to it. In this regard, it was conceded that the hours of McKissick's maintenance employees generally fluctuated only in the overtime range, and that no employee worked less than 40 hours per week unless he did so for personal reasons.

On appeal, McKissick argues that it is entitled to a credit under 29 U.S.C. § 207(e)(7). So far as we can tell, this particular matter was never urged in the district court, and, accordingly, was not considered by that court. It cannot now be argued here for the first time. In any event, it would appear that section 207(e)(7) has no applicability to the instant case.

McKissick also argues that the district court's holding that its violations were "willful" is in error. We disagree. To establish a "willful" violation of the act, it is not necessary to show that the employer actually "knew" he was violating the act. It is sufficient to show that the employer knew that the Act was "in the picture" and was aware of the Act's possible application to his employees. Mistretta v. Sandia Corp., 639 F.2d 588 (10th Cir. 1980), and Coleman v. Jiffy June Farms, Inc., 458 F.2d 1139 (5th Cir. 1971), cert. denied, 409 U.S. 948 (1972). Lucas's depositional testimony indicates that McKissick knew the Act was "in the picture."

Accordingly, the judgment of the district court is affirmed.

APPENDIX NO. 1

Employee Compensation Contract

Your position as maintenance man requires you to be available for work at irregular hours each week. Also, on occasion, you are required to work overtime beyond 40 hours per week.

Therefore, on this, the 23 day of February, 1976, a contract was entered into between Joe Burcham hereafter called "Employee," for the purposes of setting forth the agreed method of compensating the Employee for services performed by the Employer.

It is mutually agreed that the compensation of the Employee shall be calculated as follows:

1. The regular rate of pay shall be $3.94 per hour for the first 50 hours each week;

2. All hours worked in excess of the first 50 hours each week shall be paid at a rate not less than one and one-half times the regular rate of pay mentioned above;

3. The Employee is guaranteed that he/she will receive for regular time and for such overtime as the necessities of business demand, a sum not less than $850.00 per month.

4. This contract shall become null and void upon acceptance of a new wage rate, upon the termination of your employment, upon your accepting another position with the Company, or upon your becoming incapacitated to perform the required work, whichever occurs earlier. Nothing contained herein constitutes a

guarantee of continued employment but merely specifies the legal salary arrangement between you and the Employer.

(Employee's Signature)

(Employer's Representative)

APPENDIX NO. 2

EMPLOYEE COMPENSATION CONTRACT

On this, the 1st day of December, 1976, a contract was entered into between Don Abbott hereafter called "Employee," and McKissick Products Company hereafter called "Employer," for the purpose of setting forth the agreed method of compensating the Employee for services performed by the Employee.

It is mutually agreed that the compensation of the Employee shall be calculated as follows:

1. The regular rate of pay shall be $6.34 per hour.

2. All hours worked in excess of the first 40 hours each week shall be paid at a rate not less than one and one-half times the regular rate of pay mentioned above.

3. The Employee will have a minimum work week of 44 hours each work week.

4. This contract shall become null and void upon acceptance of a new wage rate, upon the termination of your employment, upon your accepting another position with the Company, or upon your becoming incapacitated to perform the required work, whichever occurs earlier. Nothing contained herein constitutes a guarantee of continued employment but merely specifies the legal salary arrangement between you and the Employer.

(Employee's Signature Date)

(Employer's Representative) Date

APPENDIX B

Case No. 77-C-485-C

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

United States Court

of Appeals

Tenth Circuit

June 17, 1980

Jack C. Silver, Clerk

RAY MARSHALL, Secretary of Labor,
United States Department of Labor,

Plaintiff,

v.

McKISSICK PRODUCTS COMPANY
and AMERICAN HOIST AND
DERRICK COMPANY, d/b/a
McKissick Products Division,

Defendant.

ORDER

The Court now considers the Motion for Partial Summary Judgment of plaintiff, and the Cross Motion for Summary Judgment of defendant. This is an action for enforcement of Section 7 of the Fair Labor Standards Act (the Act), Title 29 U.S.C. §207. Plantiff seeks partial summary judgment for a finding that defendant's pay plans for its maintenance personnel are in violation of Section 7 (hereinafter referred to as §207). Defendant seeks summary judgment that its pay plans are in compliance with §207, and that this action should therefore be dismissed with reasonable attorney fees and costs.

DEFENDANT'S PAY PLANS

In this action, plaintiff challenges two of defendant's contracts with its maintenance employees. The first contract (Contract I) was in effect from November, 1974 to December, 1976 (see Plaintiff's Exhibit 1, attached to Complaint); the second contract (Contract II) was used from December, 1976 to the present (see Plaintiff's Exhibit 2, attached to Complaint). Contract I stated that the employee would be available for work at irregular hours and would work over forty hours during some weeks. It guaranteed the employee that he or she would be paid for fifty (50) hours of work at $3.94 an hour regardless of how many hours under fifty were required that week, and that all hours in excess of fifty would be paid at one and

one-half times $3.94 an hour. Contract I also guaranteed the employee a minimum of $850 a month. In his deposition pursuant to this case, Charles Lucas, Vice President and General Manager of defendant McKissick Products, testified that the base rate for a forty hour work week in Contract I was $3.57 an hour, and that the $3.94 figure in the contract was a figure that included the ten hours per week guaranteed overtime, and similarly, that the guaranteed $850 per month included overtime compensation. (Lucas Deposition, pp.18-22). When asked if individual employees were aware that their base rate was $3.57 an hour, Mr. Lucas testified "I cannot say that they are all aware of the exact amount of the base rate. They did know that the calculation of the base rate would produce a certain weekly rate, which was

calculated, then, to a monthly sum which they would be paid, and that the $3.94 was used to figure the overtime rate." (Lucas Deposition, p.21). When asked if the company had ever received any complaints from employees that they weren't being paid time and a half for the hours between forty and fifty, Mr. Lucas stated "I don't know if you could classify it as a complaint. We did have some misunderstanding and that's what led to the change in the contract form and realigning the two numbers so that they were both the same" (i.e. so that the base rate in the contract and the base rate for a forty hour week were the same, as was true in Contract II). (Lucas Deposition, pp.36-37). Mr. Lucas also testified that to his knowledge, there was no written record of the $3.57 as the base rate. (Lucas Deposition, p.29).

Contract II, which superseded Contract I, provided that the employee would be paid $6.34 an hour for the first forty (40) hours and one and one-half times that for all hours in excess of forty each week. Contract II also guaranteed the employee a minimum work week of forty-four (44) hours. Mr. Lucas testified that Contract II was like Contract I in that the employee might work less than forty-four hours, but would nonetheless be paid the guaranteed minimum, i.e. the guarantee was for forty-four hours of pay, not for forty-four hours of work. (Lucas Deposition, p.33). Thus, both of defendant's pay plans under consideration here guaranteed the employee a minimum pay that included compensation for overtime hours which would be paid whether the employee was required to work those hours or not.

THE REQUIREMENTS OF §207

Section 207(a)(1) requires that

> Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

As plaintiff points out, the purpose of the section is to spread employment by making it more expensive to work employees overtime than to distribute the work among a greater number of employees. Overnight Transportation Company, Inc. v. Missel, 316 U.S. 572, 62 S.Ct. 1216, 86 L.Ed. 1682 (1942). Plaintiff argues that this purpose is thwarted by a pay plan such as defendant's whereby it costs no

more to work four employees fifty hours than five employees forty hours each. Plaintiff refers the Court to 29 C.F.R. §778.403 which states:

> §778.403 Constant pay for varying workweeks including overtime is not permitted except as specified in section 7(f).
>
> Section 7(f) is the only provision of the Act which allows an employer to pay the same total compensation each week to an employee who works overtime and whose hours of work vary from week to week. (See in this connection the discussion in §§778.207, 778.321-778.329, and 778.308-778.315.) Unless the pay arrangements in a particular situation meet the requirements of section 7(f) as set forth, all the compensation received by the employee under a guaranteed pay plan is included in his regular rate and no part of such guaranteed pay may be credited toward overtime compensation due under the Act. Section 7(f) is an exemption from the overtime provisions of the Act. No employer will be exempt from the duty of computing overtime compensation for an employee under section 7(a) unless the employee is paid pursuant to a plan which actually meets all the requirements

> of the exemption. These requirements will be discussed separately in the ensuing sections.

Under the terms of §778.403, supra, defendant's contracts are in violation of §207 unless they fall within §207(f).

McKISSICK'S DEFENSES

Defendant is entitled, as to the defenses within the Act, only to those defenses properly set forth in the pleadings. Rules 8(c) and 12(b), Federal Rules of Civil Procedure. See Wirtz v. C & P Shoe Corporation, 336 F.2d 21 (5th Cir. 1964); Conklin v. Joseph C. Hofgesang Sand Co., 565 F.2d 405 (6th Cir. 1977); Mitchell v. Williams, 420 F.2d 67 (8th Cir. 1969). Although the above cases involved enforcement of Title 29 U.S.C. §216 and the exemption in §213, the point as to pleading affirmative defenses is the same. Defendant's arguments as to defenses under §207(g)(3)

and §207(h) have therefore been waived and will not be considered in this decision. The court would note, however, that defendant's Contract I does not satisfy §207(g)(3) in that it was not computed based on a stated or understood wage agreement (see Deposition of Charles Lucas, pp.20-22). Moreover, it appears that Contract II would not come under §207(g)(3) in that there is no evidence that the Administrator authorized the rate in the second contract.

In its Cross Motion for Summary Judgment, defendant relies on several cases that were exempted from §207 by way of the exception in §207(f), which was found in §207(e) prior to the 1974 amendment. Not only was §207 not affirmatively pleaded as a defense, it was stipulated in the Pretrial Order as not applying to this case. Defendant's

agruments under the following cases are therefore not under consideration: Thompson v. Market Service, Inc., 17 W.H. 76 (W.D.Mo. 1965); Wirtz v. Empire Lumber Co., Inc., 19 W.H. 103 (S.D.Ga. 1969); Mitchell v. Macon Shirt Co., 230 F.2d 527 (5th Cir. 1956); and Fleming v. A. H. Belo Corp., 121 F.2d 207 (5th Cir. 1941), affirmed 316 U.S. 624, 62 S.Ct. 1223, 86 L.Ed. 1716 (1943).

Defendant's remaining defense is that its pay plans in Contracts I and II are not in violation of §207, as illustrated by the holding in Tobin v. Little Rock Packing Co., 202 F.2d 234 (8th cir. 1953), cert. denied 346 U.S. 832, 74 S.Ct. 26 (1953). Plaintiff argues that any weight Tobin might once have carried has been supplanted by the Eighth Circuit's more recent holding in Marshall v. Hamburg Shirt Corp., 577 F.2d 444 (8th

Cir. 1978). The Court finds it unnecessary to consider Hamburg's effect on Tobin as the latter is inapplicable. The basis for the Tobin decision favoring that defendant's pay plan was a §207(e) [now §207(f)] exemption, as revealed in the following language from that case:

> Contracts in which, as in the present case, the guaranteed compensation is actually predicated upon and computed by the stipulated wage rate meet all requirements of the Act. This was true before as it is after the amendment[1] of the Act in 1949 to recognize the validity of such contracts.

202 F.2d at 238. footnote 1 in the above passage quoted the following from §207:

> 29 U.S.C.A. §207(e): "No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of forty hours if such employee is employed pursuant to a bona fide individual contract, * * * if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies

----

1

> a regular rate of pay of not less than the minimum hourly rate provided in section 206(a) of this title and compensation at not less than one and one-half times such rate for all hours worked in excess of forty in any workweek, and (2) provides a weekly guaranty of pay for not more than sixty hours based on the rates so specified.

This is the execption to §207(a) not found in §207(f), an exception which does not apply to this action. Although the Tobin court did state that "(t)his was true before as it is after the amendment of the Act in 1949 to recognized the validity of such contracts", that is, such contracts were always valid under §207, and §207(e) only codified their validity, defendant may not claim that such a holding justifies its Contracts I and II. The Tobin court found only that the contract before it came under an exception that is now embodied by §207(f), and defendant has expressly

waived that exception that is now embodied by §207(f), and defendant has expressly waived that exception.

THE APPLICABILITY OF 29 C.F.R. §778.400 <u>et seq.</u>

Plaintiff urges that "(t)he restriction set forth in 29 C.F.R. §778.403 and other sections of the Interpretative Bulletin are entitled to weight in the judicial costruction of the Act (<u>Skidmore</u> v. <u>Swift & Co.</u>, 323 U.S. 134, 140 (1944))" and moreover that section 778.403 was expressly approved in <u>Marshall</u> v. <u>Hamburg Shirt Co.</u>, <u>supra.</u> <u>Skidmore</u> provides:

> We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts litigants may properly resort for guidance. The weight of

> such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

323 U.S. at 140. In the instant case, the Court's attention is called to 29 C.F.R. §778.403 (see pages 3-4, supra). This section was the basis for the Hamburg court's decision, where it found "the plan implemented by the employer in this case to be within the scope of 29 C.F.R. §778.403 because the practical effect of the guaranty is to allow the employer to pay the same compensation each week even though the employee works a varying number of hours." 577 F.2d at 446. An identical effect is seen in defendant McKissick's pay plans now before the Court, and based on the

decisions in Skidmore, and more particularly in Hamburg, this Court will observe the guidelines in 29 C.F.R. §778.403 and find that both of defendant's pay plans in this case are in violation of Title 29, U.S.C. §207 in that both Contracts I and II paid a predetermined amount for varying hours of work from week to week.

It is therefore the finding of this Court that defendant McKisick Products Company's Employee Compensation Contracts, dated February 23, 1976, and December 1, 1976, are in violation of Section 7 of the Fair Labor Standards Act, Title 29 U.S.C §207. That being the extent of the partial judgment sought by plaintiff in this motion, consideration of other issues will resume at the proper time.

For the foregoing reasons, defendant's Cross Motion for Summary Judgment is overruled, and plaintiff's Motion for Partial Summary Judgment is sustained.

It is so Ordered this 17th day of June, 1979.

H. DALE COOK
Chief Judge, U.S. District Court

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

FILED
DEC 18, 1981
Jack C. Silver, Clerk
U.S. DISTRICT COURT

RAYMOND J. DONOVAN, Secretary of Labor, United States Department of Labor Plaintiff, vs. McKISSICK PRODUCTS COMPANY and AMERICAN HOIST AND DERRICK COMPANY, d/b/a McKissick Products Division, Defendants.	)	No. 77-C-485-C

ORDER

Now before the Court for its consideration is the motion of the plaintiff, pursuant to Rule 56 of the Federal Rules of Civil Procedure for a judgment prospectively enjoining the defendants from violating the provisions

of the Fair Labor Standards Act of 1938, (hereinafter, the Act), as amended, 29 U.S.C. §201, et seq., and enjoining defendants from withholding payment of overtime compensation due their employees.

This is an action brought by the Secretary of Labor, alleging that defendants have failed to pay the overtime compensation required by the Act, Title 29 U.S.C. §207. The Secretary specifically contended that the two wage plans used by the defendants violated section 7(a) of the Act as a matter of law. The parties herein stipulated on May 1, 1978 in a pretrial order that there were only 3 contested issues of fact. One of these issues, whether defendants violated Section 7 of the Act, was decided by this Court in favor of plaintiff in a partial summary judgment

on June 17, 1980. The two remaining issues in controversy involve the amount of overtime compensation due to the defendants' employees because of the illegal pay plan, and whether prior to November of 1974 defendants had been awre of the Act and the Act's requirements.

On June 20, 1979, the parties stipulated that payroll summaries prepared by Randy O'Neal of the Wage-Hour Division, Employment Standards Administration, United States Department of Labor, reflected the actual hours worked by the Maintenance employees and the amounts paid to such employees for these hours up to February, 1978. As to the period from February, 1978 to the present, Mr. O'Neal has submitted his arithmetical calculations as to total

amount due with interest, based on defendants' records produced to plaintiff.

The pleadings, summaries, answers to interrogatories, admissions in the pretrial order, and the affidavit of Randy O'Neal show there is no genuine issue of fact and that plaintiff is entitled judgment as a matter of law. Overtime compensation is governed by Section 7a of the Act, which provides in pertinent part as follows:

> No employer shall employ any of his employees . . . for a workweek longer than 40 hours unless such employee receives compensation for his employment. . . at a rate of not less than one and one-half times the regular rate. . .

The proper method for computing the overtime due an employee is to divide the salary by the number of hours worked to

determine a regular rate. One-half times this regular rate is then awarded for all hours in excess of 40. Overnight Motor Transportation Company v. Missel, 40 F. Supp. 174 (D.C. Ma, 1941), rev'd 126 F.2d 98, aff'd 316 U.S. 577, 62 S.Ct. 1216, 86 L.Ed. 1682 (1942); Triple AAA v. Wirtz, 378 F.2d 884 (10th Cir. 1967). This rule applies unless the employer can establish that he is entitled to a 7(f) or other exemption from this rule. See also 29 CFR §778.1, §778.108, §778.109, §778.403. The Court has already ruled that none of the exemptions to the Act apply to defendants. (See Order of June 17, 1980.)

As to the issue of the Statute of Limitations for recovery of overtime compensation due under the Act, it is clear that the three-year period for willful violations applies in this

action. The term "willful" includes voluntary as distinguished from accidental conduct, marked by careless disregard of the right to so act. U.S. v. Illinois Central Railroad Company, 303 U.S. 239, 58 S.Ct. 538 (1938). The deposition of Charles Lucas herein, and the provisions of the contracts in issue establish that defendants knew their actions were governed by the Act. If an employer knows or has reason to know that his actions are covered by the Act, violations of the Act must be considered as willful under §255 of Title 29. Marshall v. Georgia Southwestern College, 489 F.Supp. 1322 (D.C. Ga. 1980); Dunlop v. Zager, 529 F.2d 524 (6th Cir. 1975); Brennan v. Air Terminal Parking of Columbia, 498 F.2d 1397 (5th Cir. 1975).

It is therefore the judgment of the Court that plaintiff's motion for summary judgment should be and hereby is sustained; that the amount of compensation due to defendants' employees is to be calculated according to the method proposed by the plaintiff; and that the three-year Statute of Limitations for willful violation of the Act applies herein, requiring compensation to be calculated beginning with the date of November 21, 1974.

It is so Ordered this 18th day of December, 1981.

H. DALE COOK
Chief Judge, U.S. District Court

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FILED
DEC 18, 1981
Jack C. Silver, Clerk
U.S. DISTRICT COURT

RAYMOND J. DONOVAN, Secretary of Labor, United States Department of Labor,	)	
Plaintiff,	)	Civil Action File No. 77-C-485-C
v.	)	
MCKISSICK PRODUCTS COMPANY and AMERICAN HOIST AND DERRICK CORPORATION d/b/a MCKISICK PRODUCTS DIVISION,	)	
Defendant.	)	

JUDGMENT

In accordance with the findings of fact and conclusions of law signed and entered in this action on the 19th day of June, 1981, and on December 18, 1981, it is,

. . . .

ORDERED, ADJUDGED and DECREED that defendant McKissick Products Company, and American Hoist and Derrick Corporation d/b/a McKissick Product Division and their officers, agents, servants, employees and all persons in active concert or participation with them be and they hereby are permanently enjoined and restrained from violating the provisions of Section 7 of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C.

Section 201, _et seq._, hereinafter referred to as the Act, in any of the following manners:

1. Defendants shall not, contrary to sections 7 and 15(a)(2) of the Act, 29 U.S.C. §§207 and 215(a)(2) employ any employee in commerce or in the production of goods for commerce, or in an enterprise engaged in commerce or in the production of goods for commerce, within the meaning of the Act, for workweeks longer than forty (40) hours, unless the employee receives compensation for his employment in excess of forty (40) hours at a rate not less than one and one-half times the regular rate at which he is employed.

It is further ORDERED, ADJUDGED and DECREED that defendants be, and they hereby are, enjoined from withholding payment of overtime compensation in the

total amount of $90,218.75 which the Court finds is due under the Act to defendants' employees named in Exhibit A attached hereto[6] in the amounts indicated for the period November 21, 1974, to December 18, 1981. To comply with this provision of this judgment, defendants, within ten (10) days from entry of this judgment, shall deliver to the plaintiff a cashier's or certified check payable to "Employment Standards Administration-Labor" in the total amount of $90,218.75, less social security and income tax deductions, the proceeds of which check the plaintiff shall distribute to defendants' employees named herein. Any net sums which within one year after the payment pursuant to this judgment have not been distributed to such employees,

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[6]Exhibit A has not been filed of record nor served on Defendants.

or to their estate if necessary, because of plaintiff's inability to locate he(sic) proper persons, or because of their refusal to accept such sums, shall be deposited with the Clerk of this Court who shall forthwith deposit such money with the Treasurer of the United States pursuant to 28 U.S.C. §2041.

It is further ORDERED that the defendants pay an additional sum of $35.85 for each day that this judgment is not paid in full and proof of satisfaction is not filed or record.

It is further ORDERED that the costs of this action be, and the same hereby are, taxed against defendants for which execution may issue.

Done and ordered this 18th day of December, 1981.

H. DALE COOK
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

SEPTEMBER TERM - October 19, 1983

RAYMOND J. DONOVAN, Secretry of Labor, United States Department of Labor, Plaintiff-Appellee, vs. McKISSICK PRODUCTS COMPANY, AMERICAN HOIST AND DERRICK COMPANY, d/b/a McKissick Products Division, Defendants-Appellants.	)	JUDGMENT No. 82- 1255 (D.C. No. 77-0485-C)

This cause came on to be heard on the record on appeal from the United States District Court for the Northern District of Oklahoma, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed.

HOWARD K. PHILLIPS, Clerk

By Robert L. Hoecker
Chief Deputy Clerk

NOVEMBER TERM

NOVEMBER 30, 1983

Before the Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honrable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Circuit Judges, and Honorable Ewing T. Kerr*

RAYMOND J. DONOVAN, Secretary of Labor, United States Department of Labor, Plaintiff-Appellee, vs. McKISSICK PRODUCTS COMPANY, AMERICAN HOIST AND DERRICK COMPANY d/b/a McKissick Products Division Defendants-Appellants.	ORDER No. 82- 1255 (D.C. No. 77-0485-C)

This matter comes on for consideration of Appellants Petition for Rehearing and Suggestion for Rehearing En Banc in the captioned cause.

Upon consideration whereof, the Petition for Rehearing is denied by the panel to whom the case was argued and submitted.

The Petition for Rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

HOWARD K. PHILLIPS, Clerk

By Robert L. Hoecker
Chief Deputy Clerk

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*District Court Judge from the District of Wyoming, sitting by designation.

No. 83-1426

In the Supreme Court of the United States

OCTOBER TERM, 1983

McKISSICK PRODUCTS COMPANY, ET AL.,
PETITIONERS

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners' pay plan violates the overtime provision of the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.*, by prescribing a fixed amount of pay for weeks involving varying amounts of overtime.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Page

Cases—Continued:

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1426

MCKISSICK PRODUCTS COMPANY, ET AL.,
PETITIONERS

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A22) is reported at 719 F.2d 350. The orders entered by the district court (Pet. App. B1-B25) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 19, 1983 (Pet. App. C1-C2), and a petition for rehearing was denied on November 30, 1983 (*id.* at C3-C4). The petition for a writ of certiorari was filed on February 28, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner McKissick Products Company is a division of petitioner American Hoist and Derrick Company. At its plant in Tulsa, Oklahoma, McKissick manufactures

equipment such as lifting tackle, wire line and chain accessories designed for use with wire rope. Pet. App. A6-A7.

From November 1974 to December 1981, McKissick compensated its maintenance employees pursuant to standardized, individual employee compensation contracts (Pet. App. A7, B4-B7). Under the contract that went into effect in December 1976,[1] the employees received a guaranteed minimum weekly wage, regardless of the hours actually worked, based on a contractually agreed minimum in excess of 40 hours of work per week (*id.* at A7, B7). Specifically, the contract provided for: (1) a regular rate of pay of $6.34 per hour; (2) one and one-half times the regular rate of pay for all hours worked in excess of 40 hours per week; and (3) minimum guaranteed pay for a workweek of 44 hours (*id.* at A10-A11, B7).

McKissick stipulated that its maintenance employees' duties did not require them to work irregular hours (Pet. App. A4, A14-A15). Except for leave for personal reasons, maintenance employees worked at least 40 hours per week, and their weekly hours fluctuated only in the overtime range (*id.* at A15).

2. The Secretary of Labor brought this action in the United States District Court for the Northern District of Oklahoma under the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.* (FLSA or the Act), to enjoin McKissick from violating the overtime provision contained in Section 7(a)(1) of the Act, 29 U.S.C. 207(a)(1),[2] and to compel

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[1]Only the contract that began in December 1976 is at issue here (Pet. 7 n.2).

[2]Section 7(a)(1), 29 U.S.C. 207(a)(1), establishes the following basic overtime compensation requirements:

> Except as otherwise provided in this section, no employer shall employ any of his employees * * * for a workweek longer than forty hours unless such employee receives compensation for his

payment of back overtime wages due its maintenance employees (Pet. App. B3, B19-B20). The Secretary maintained that McKissick's practice of paying a fixed weekly salary for workweeks involving varying amounts of overtime failed adequately to compensate employees for overtime hours worked. On motions for summary judgment, the district court held that McKissick's employee compensation contracts violated Section 7(a) of the Act, as interpreted in 29 C.F.R. 778.403,[3] in that they permitted McKissick to pay its employees the same total compensation each week even though they worked varying amounts of overtime (Pet. App. B16-B17). The court further held that the overtime exception set forth in Section 7(f) of the Act, 29

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employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

[3]29 C.F.R. 778.403 provides:

Constant pay for varying workweeks including overtime is not permitted except as specified in section 7(f).

Section 7(f) is the only provision of the Act which allows an employer to pay the same total compensation each week to an employee who works overtime and whose hours of work vary from week to week. (See in this connection the discussion in §§ 778.207, 778.321-778.329, and 778.308-778.315.) Unless the pay arrangements in a particular situation meet the requirements of section 7(f) as set forth, all the compensation received by the employee under a guaranteed pay plan is included in his regular rate and no part of such guaranteed pay may be credited toward overtime compensation due under the Act. Section 7(f) is an exemption from the overtime provisions of the Act. No employer will be exempt from the duty of computing overtime compensation for an employee under Section 7(a) unless the employee is paid pursuant to a plan which actually meets all the requirements of the exemption. These requirements will be discussed separately in the ensuing sections.

U.S.C. 207(f),[4] did not apply and that, by its failure to plead the other exceptions to the overtime requirement, McKissick had waived them (*id.* at B10-B11, B14-B15). The court permanently enjoined McKissick from violating Section 7 of the Act and ordered payment of back overtime wages due McKissick's maintenance employees (*id.* at B27-B30). The court determined that the proper method to compute the overtime premium pay due was to divide each employee's salary by the number of hours worked to determine the regular rate and then to multiply one and one-half times this regular rate by all hours worked in excess of 40 (*id.* at B22-B23). McKissick's motions for a new trial and to vacate the district court's judgment were denied (*id.* at A6).

The court of appeals affirmed (Pet. App. A1-A22). Applying Section 7 of the Act and 29 C.F.R. 778.403, the court held that McKissick's pay plans neither complied with the FLSA overtime provision nor qualified for the exception provided by Section 7(f) (Pet. App. A10, A14). The court reasoned that since the guarantee in the December 1976 contract was in fact not for hours of *work*, but rather for hours of *pay*, McKissick paid its employees "a fixed predetermined amount for varying hours of work from week to

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[4]Section 7(f), 29 U.S.C. 207(f), provides:

> No employer shall be deemed to have violated subsection (a) of this section by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under subsection (a) of this section if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate * * * and compensation at not less than one and one-half times such rate for all hours worked in excess of such maximum workweek, and (2) provides a weekly guaranty of pay for not more than sixty hours based on the rates so specified.

week which had the practical effect of allowing the employer to pay the same compensation regardless of the number of hours actually worked, up to the guarantee" (*id.* at A11). The court of appeals rejected McKissick's contention that its pay plan was valid under *Walling* v. *A.H. Belo Corp.*, 316 U.S. 624 (1942). As the court noted (Pet. App. A14-A15), the rule stated in *Belo* was codified in Section 7(f) of the Act, which applies only to an employer engaged in a business with unpredictable weekly hours of work (see note 4, *supra*). However, McKissick had stipulated by pretrial order that its business was not of that nature and that the provisions of 29 U.S.C. 207(f) did not apply to it (Pet. App. A15). Finally, the court of appeals rejected (*ibid.*) as untimely raised and in any event inapplicable McKissick's claim for a credit under Section 7(e)(7) and (h) of the Act for the contractual overtime premium.[5]

ARGUMENT

The decision of the court of appeals is correct and consistent with the purposes of the FLSA. Moreover, the court's decision does not conflict with any decision of this Court or of any other court of appeals. Further review therefore is not warranted.

Petitioners erroneously contend (Pet. 16-28) that the court of appeals' refusal to apply the principles established in *Walling* v. *A.H. Belo Corp.*, *supra*, and its progeny conflicts with decisions of this Court. In *Belo*, the Court approved a compensation contract for employees who worked irregular hours (316 U.S. at 627) that provided for a

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[5]Section 7(h), 29 U.S.C. 207(h), authorizes the crediting of payments that meet the conditions of Section 7(e)(7), 29 U.S.C. 207(e)(7), toward overtime compensation otherwise payable. Section 7(e)(7) applies to "extra compensation provided by a premium rate paid * * * for work outside of the hours established * * * as the basic, normal or regular workday * * * or workweek * * *."

basic rate of pay for regular-time hours, one and one-half times the basic rate for overtime hours, and a guaranteed minimum weekly payment regardless of the hours actually worked (*id.* at 628). Based on what it viewed as the Act's "common sense recognition of the special problems confronting employer and employee in businesses where the work hours fluctuate from week to week and from day to day" (*id.* at 635) and the value to employees in such businesses of "the security of a regular weekly income" (*ibid.*), the Court upheld the contract at issue.

In response to the Court's decision, Congress codified the rule of *Belo* in Section 7(f) of the FLSA, 29 U.S.C. 207(f) (quoted in note 4, *supra*). See 95 Cong. Rec. A5476 (1949) (remarks of Rep. Lucas).[6] Petitioners stipulated below, however, that the exception provided in Section 7(f) of the Act is inapplicable to this case because there is no fluctuation in the employees' nonovertime hours. Pet. App. A4. Likewise, petitioners concede in this Court (Pet. 44) that "[t]he existence, or non-existence, of Section 7(f) of the Act is irrelevant to the validity of the compensation agreements between Petitioner and its employees." Accordingly, there is no conflict between the decision below and the principles announced by the Court in *Belo*, as codified in Section 7(f).

While petitioners acknowledge that the exception provided in Section 7(f) of the Act cannot avail them because of the absence of any fluctuation in the nonovertime hours worked by their employees, they contend (Pet. 37-44) that Section 7(f) does not provide the exclusive means whereby an employer may guarantee payment for a minimum

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[6]Section 7(f), 29 U.S.C. 207(f), was originally enacted as Section 7(e) of the Fair Labor Standards Amendments of 1949 (63 Stat. 910, 914). It was redesignated without change in wording by the Fair Labor Standards Amendments of 1966 (Pub. L. No. 89-601, 80 Stat. 830, 836), which became effective February 1, 1967 (*id.* at 844).

number of hours of work. Petitioners thus suggest that, by enactment of Section 7(f), Congress intended only to limit the maximum number of hours that could be guaranteed by a *Belo*-type contract, not to restrict guaranteed pay plans to businesses that require irregular nonovertime hours. There is no support for petitioners' claim. Indeed, the relevant lower court case law is to the contrary. See *Donovan* v. *Brown Equipment & Service Tools, Inc.*, 666 F.2d 148, 154 (5th Cir. 1982); *Marshall* v. *Hamburg Shirt Corp.*, 577 F.2d 444 (8th Cir. 1978); *Hodgson* v. *Price*, 486 F.2d 1406 (7th Cir. 1973) (table) (published at 21 Wage & Hour Cas. 342, 343), cert. denied, 416 U.S. 956 (1974). Nor has this Court ever suggested that the scope of the exception recognized in *Belo* exceeds the scope of the exemption codified in Section 7(f).[7]

Petitioners erroneously rely on the Eighth Circuit's decision in *Tobin* v. *Little Rock Packing Co.*, 202 F.2d 234, cert. denied, 346 U.S. 832 (1953). But in *Little Rock Packing*, the court of appeals upheld a contract as coming within the exception in Section 7(f) of the Act. 202 F.2d at 238 & n.1. Because petitioners have conceded that Section 7(f) has

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[7]As noted above (page 6, *supra*), the remarks of Representative Lucas, the sponsor of the bill that became Section 7(f) (see 95 Cong. Rec. A5475 (1949)), indicate that the provision was intended to codify the *Belo* decision entirely. This Court has frequently noted the special weight that is due the views of the sponsor of legislation. See *NLRB* v. *Fruit & Vegetable Packers*, 377 U.S. 58, 66 (1964). By contrast, the Court has "often cautioned against the danger, when interpreting a statute, of reliance upon the views of its legislative opponents" (*ibid.*). The views of Representative Combs, on which petitioners rely (Pet. 40), were stated in the context of his opposition to the House's substitution of the Lucas bill for a bill sponsored by Representative Lesinski, which Representative Combs had supported (95 Cong. Rec. 11221 (1949) (remarks of Rep. Combs)). In any event, nothing in Representative Combs' remarks suggests that *Belo* contracts would be available to employers whose businesses do not require irregular hours of nonovertime work (*ibid.*).

no application to the instant case, there can be no conflict between it and *Little Rock Packing*.[8]

In any event, *Little Rock Packing* is not authority for the proposition that a *Belo* contract is appropriate even though the employer's business does not require irregular nonovertime hours. First, as noted below (note 8, *infra*), the Secretary did not challenge the contract at issue in that case based on the absence of a showing of irregular hours. Rather, the thrust of the Secretary's challenge apparently was that no employee ever worked in excess of the maximum weekly hours guaranteed, so that there was never any occasion to rely on the stipulated hourly rate in determining the overtime compensation actually paid. See petition for a writ of certiorari filed in *Tobin* v. *Little Rock Packing Co.*, (No. 831, 1952 Term); see also *Mitchell* v. *Hartford Steam Boiler Inspection & Insurance Co.*, 235 F.2d 942, 946 (2d Cir.), cert. denied, 352 U.S. 941 (1956) (citing *Little Rock Packing* in support of rejection of Secretary's contention that a *Belo* plan is invalid where employee's actual hours do not exceed number of guaranteed hours in a substantial number of workweeks); *Mitchell* v. *Adams*, 230 F.2d 527, 531 (5th Cir. 1956) (same); *Mitchell* v. *Brandtjen & Kluge, Inc.*, 228 F.2d 291, 298 (1st Cir.), cert. denied, 352 U.S. 940 (1956) (same). Our research has disclosed no appellate court decision that has cited *Little Rock Packing* for the proposition that a *Belo* contract is appropriate where the employee's hours fluctuate only in the overtime range. This is strong

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[8]Petitioners argue (Pet. 29-30, 38-39) that *Little Rock Packing* cannot be read as a mere application of Section 7(f) because the reported facts reveal no fluctuation in the regular time hours (hours below 40) worked by the employees, as required by the "irregular hours" language in Section 7(f). But the court in *Little Rock Packing* expressly relied on Section 7(f). See 202 F.2d at 238 & n.1. We note in addition that the Secretary apparently did not challenge the applicability of the exemption in the absence of a showing of "irregular hours."

evidence that *Little Rock Packing* is not authority for the position urged by petitioners. But even if it were, the fact that no appellate court has adopted that view since 1953 indicates that any conflict that may exist between the decision below and *Little Rock Packing* is not of sufficient significance to warrant this Court's attention.

Indeed, a more recent decision of the Eighth Circuit, *Marshall* v. *Hamburg Shirt Corp., supra*, indicates that that court currently is in full agreement with the other courts of appeals that have held that the sole exception from the duty of computing overtime compensation under Section 7(a) is pursuant to a plan that meets all of the requirements of the Section 7(f) exemption, including the requirement of fluctuating *non*overtime hours. In *Hamburg Shirt*, the court of appeals rejected a guaranteed overtime contract on the ground that it did not require irregular hours of work, "even though the employee works a varying number of overtime hours" (577 F.2d at 446).[9]

Moreover, the Secretary of Labor has consistently interpreted Section 7(f) to be the only provision of the Act that permits an employer to pay the same weekly compensation to an employee who works overtime and whose hours of work vary from week to week (see 29 C.F.R. 778.403) and has consistently construed the irregular hours provision of

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[9]Petitioners' attempt to distinguish *Hamburg Shirt* on the grounds (Pet. 32-33) that the contract involved in that case "did not establish a fixed 'regular rate' from which overtime compensation due could be computed, and did not in fact properly compensate overtime hours" is unavailing. The court's reliance on the absence of a fixed regular rate clearly was an alternative basis for its rejection of the contract at issue (577 F.2d at 447 (emphasis added)):

> *First*, the duties of these employees do not *necessitate* irregular hours of work. *Second*, the guaranteed plan is intended to include overtime compensation but does not compensate hours in excess of 40 at one and one-half times a specified regular rate.

Section 7(f) as requiring fluctuation in the employee's nonovertime as well as overtime hours (see 29 C.F.R. 778.406). Furthermore, where guaranteed pay plans fail to meet the requirements of Section 7(f), all compensation received under the plan is included in the employee's "regular rate" of pay (29 C.F.R. 778.403).[10] These interpretations "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944). The court of appeals correctly applied the Secretary's regulations in this case.

As the Secretary's regulations (29 C.F.R. 778.406) explain, limitation of the availability of *Belo* contracts to employers whose businesses require irregular nonovertime

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[10]Contrary to petitioners' assertion, this approach, adopted by the courts below to compute petitioners' employees' "regular rate" of pay, does not conflict with the decision of any other court of appeals. The district court (Pet. App. B22-B23), affirmed by the court of appeals, employed the formula for computing overtime for employees under a fixed weekly wage established by this Court in *Overnight Motor Transportation Co.* v. *Missel*, 316 U.S. 572, 580 n.16 (1942): "Wage divided by hours equals regular rate. Time and a half regular rate for hours employed beyond statutory maximum equals compensation for overtime hours." The courts of appeals have uniformly followed this approach for computing overtime pay due where, as here, employees receive a fixed salary for workweeks involving varying overtime hours. See, *e.g.*, *Marshall* v. *Hamburg Shirt Corp.*, 577 F.2d at 447; *Triple "AAA" Co.* v. *Wirtz*, 378 F.2d 884, 887 (10th Cir. 1967).

The cases relied on by petitioners (Pet. 34-35) are not to the contrary. In *Marshall* v. *Chala Enterprises, Inc.*, 645 F.2d 799, 801 (1981), the Ninth Circuit did not even "reach the issue whether the district court erroneously accepted [the employer's] computation of an hourly rate, arrived at after the fact by dividing the monthly salary into a regular hourly wage and a stepped-up overtime rate" (footnote omitted). Rather, in the circumstances of that case, the court of appeals expressly approved (*ibid.*) use of the same formula employed by the Secretary and the courts below in this case — "when a weekly salary is paid, the employer is deemed to have paid the same rate for all hours worked, rather than the requisite overtime compensation." In any event, *Chala*

hours is entirely consistent both with this Court's decisions and with the purposes underlying the FLSA. The Court has acknowledged that the overtime provision of the Act was intended to serve two fundamental purposes: (1) to "spread employment" and shorten hours by making it more expensive for employers to pay employees for overtime than to distribute the work among a larger number of employees; and (2) to compensate employees for the burden of working long hours. *Walling* v. *Helmerich & Payne, Inc.*, 323 U.S. 37, 40 (1944); *Overnight Motor Transportation Co.* v. *Missel*, 316 U.S. at 577-578. The court of appeals correctly concluded that petitioners' pay plan is inconsistent with

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Enterprises is distinguishable from the present case because the employees in *Chala* apparently worked a fixed, 60-hour week, rather than varying amounts of overtime. See *id.* at 800. In *Brennan* v. *Valley Towing Co.*, 515 F.2d 100, 103 (9th Cir. 1975), the court also approved of the approach adopted below: "[T]he district court should have determined the 'regular rate' of pay by dividing the total weekly compensation paid to each employee by the actual hours worked. The district court should then have awarded such employee an amount representing half of that regular rate for each overtime hour worked in the relevant period." In *Wirtz* v. *Leon's Auto Parts Co.*, 406 F.2d 1250 (5th Cir. 1969), as well, the court of appeals upheld the Secretary's determination.

The remaining cases cited by petitioners (Pet. 35-36) are inapposite. *Marshall* v. *Hendersonville Bowling Center*, 483 F. Supp. 510 (M.D. Tenn. 1980), aff'd, 672 F.2d 917 (6th Cir. 1981) (table), did not involve guaranteed pay for fluctuating overtime hours; the parties in that case had contracted for 47 ½ hours of work per week at a specified salary. 483 F. Supp. at 515. The other cases relied on by petitioners are distinguishable in that they satisfied Section 7(f)'s requirement of irregular hours of nonovertime work. See *Mitchell* v. *Adams*, 230 F.2d 527, 529 n.4 (5th Cir. 1956); *McComb* v. *Pacific & Atlantic Shippers Ass'n*, 8 Wage & Hour Cas. 43, 44 (N.D. Ill. 1948), aff'd, 175 F.2d 411 (7th Cir. 1949); *Boll* v. *Federal Reserve Bank*, 21 Wage & Hour Cas. 876, 881 (E.D. Mo. 1973); cf. *Beechwood Lumber Co.* v. *Tobin*, 199 F.2d 878 (5th Cir. 1952) (no exemption from overtime provision where irregular hours are not required by employer's business). But see *Wirtz* v. *Empire Lumber Co.*, 19 Wage & Hour Cas. 103 (S.D. Ga. 1969).

these salutary legislative goals. As the court held (Pet. App. A11), the pay plan at issue here conflicts with the legislative purpose of spreading available work among a greater number of employees by making overtime more expensive, because the employer has agreed to pay the contracting employee for four hours of overtime regardless of whether he works those hours. The plan likewise is inconsistent with the congressional intention to provide a compensatory premium for the employee who must work overtime. Under its terms, rather than receiving an additional one and one-half times the actual regular rate of pay for each hour worked in excess of 40, the employee receives no additional pay until the hours worked exceed the "guaranteed" number.

This case well illustrates that if the fluctuation in the workweek hours need occur only in overtime hours (as petitioners contend), an employer could utilize *Belo* contracts for virtually all employees and thereby avoid the financial deterrent to the use of overtime hours that Section 7 was designed to impose. Moreover, so long as the fluctuation occurs only in overtime hours, the employees are afforded stability of income and employment; the factors that led this Court to uphold the contract at issue in *Belo* therefore do not require—or warrant—the same result in these circumstances. See 29 C.F.R. 778.406.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General

FRANCIS X. LILLY
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MAY 1984

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